80-837

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL JOHN GRASSI, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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November 24, 1980

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Walter v. United States*, 100 S.Ct. 2395 (1980) mandates reversal of Grassi's conviction since *Walter* invalidated the same search involved in this case?

2. Whether the United States Court of Appeals for the Fifth Circuit violated this Court's mandate when it concluded that Grassi had waived the issue involved in *Walter v. United States*, 100 S.Ct. 2395 (1980)?

3. Whether the Fifth Circuit's waiver determination conflicts with decisions of this Court and those of other circuits?

INDEX

Page

Questions Presented i

Opinions Below 2

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ

1. The Decision Below Directly Conflicts With *Walter v. United States*, 100 S.Ct. 2395 (1980). *Walter* Mandates Reversal Of Grassi's Conviction Since It Invalidated The Same Search Involved In This Case. 9

2. The United States Court Of Appeals For The Fifth Circuit Violated This Court's Mandate When It Concluded That Grassi Had Waived The Issue Involved In *Walter v. United States*, 100 S.Ct. 2395 (1980). 10

3. The Fifth Circuit's Waiver Determination Conflicts With Decisions Of This Court And Those Of Other Circuits. 13

Conclusion 19

Appendix 1a

PREVIOUS PAGE WAS BLANK

CITATIONS

CASES: Page

Grassi v. United States, 602 F.2d 1191 (5th Cir. 1980) 2,5

Grosso v. United States, 390 U.S. 62 (1968) 14

In re Nelson, 445 F.2d 631 (8th Cir. 1971) 12

McClain v. Seaboard Coastline Railroad Co., 490 F.2d 863 (5th Cir. 1975) 7

Nelson v. United States, 402 U.S. 1006 (1971) .12-13

Rakas v. Illinois, 99 S.Ct. 421 (1978) 8

Santos v. United States, 417 F.2d 340 (7th Cir. 1969) 15

United States v. Bagby, 451 F.2d 920 (9th Cir. 1971) 16

United States v. Bush, 582 F.2d 1016 (5th Cir. 1978) 7,11,13

United States v. E. I. Du Pont De Nemours and Co., 366 U.S. 316 (1961) 13

United States v. Grassi, 626 F.2d 444 (5th Cir. 1980) 2,7,10

United States v. Haymes, 610 F.2d 309 (5th Cir. 1980) 19

United States v. Lefkowitz, 284 F.2d 310 (2d Cir. 1960) 16,17

United States v. Love, 472 F.2d 490 (5th Cir. 1973) 16,17

CITATIONS (Continued)

Page

United States v. Manfredonia, 391 F.2d 229 (2d Cir. 1968) 15

United States v. Pincione, 565 F.2d 404 (6th Cir. 1977) 16

United States v. Sanders, 592 F.2d 795 (5th Cir. 1979) 4,6,8,10,14

Walter v. United States, 100 S.Ct. 2395 (1980) i,3,4,6,8-13,16

West v. Brown, 558 F.2d 757 (5th Cir. 1977) 7

OTHER AUTHORITIES:

ABA Code Prof. Resp. E.C. 7-4; D.R. 7-102(A)(2), (3) 19

United States Constitution, Amendment IV 2,3,9-11,13

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WILLIAM JOHN GRASSI, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

The Petitioner Michael John Grassi, Jr. respectfully prays that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 25, 1980.

OPINIONS BELOW

Petitioner Grassi's criminal conviction was affirmed by decision of the United States Court of Appeals for the Fifth Circuit rendered on September 19, 1979 and reported at 602 F.2d 1191. Certiorari was timely sought in this Court. Certiorari was granted by summary order dated June 30, 1980. The order vacated the judgment of conviction and remanded the case to the Fifth Circuit. On remand, the Fifth Circuit affirmed by opinion dated September 25, 1980 and reported at 626 F.2d 444. The opinions and orders of the Fifth Circuit and of this Court appear in the appendix to this brief.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 25, 1980. A timely petition for rehearing was denied without opinion on October 20, 1980. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This case is both legally and factually related to a case recently before this Court, *Walter v. United States*, 100 S.Ct. 2395 (1980). Notwithstanding this Court's mandate to the contrary, the United States Court of Appeals for the Fifth Circuit has refused to consider whether Grassi's fourth amendment rights were violated for the reasons this Court set out in *Walter*. The argument which compelled this Court to reverse the convictions in *Walter* also compels reversal of Grassi's conviction.

Grassi worked for Arthur Sanders, William Walter and Trans World America, Inc. a/k/a TWA, Inc. Grassi, Sanders, Walter and TWA were indicted together for various offenses relating to obscene materials.[1] All filed motions to suppress the obscene materials on the same grounds. The motions were heard simultane-

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1 Grassi was indicted for and convicted of violating 18 U.S.C. §371 for knowingly conspiring to use a common carrier to ship obscene materials interstate in violation of 18 U.S.C. §1462 and knowingly transporting obscene materials interstate for the purpose of sale and distribution in violation of 18 U.S.C. §1465.

ously and denied. Grassi's case was then severed from those of the other defendants.

Grassi's codefendants were tried separately and their convictions were affirmed. *United States v. Sanders*, 592 F.2d 795 (5th Cir. 1979). This Court granted certiorari and reversed. *Walter v. United States*, 100 S.Ct. 2395 (1980). This Court's plurality opinion stated the relevant facts:

> Only a few of the bizzare facts need be recounted. On September 25, 1975, 12 large, securely sealed packages containing 871 boxes of eight-millimeter film depicting homosexual activities were shipped by private carrier from St. Petersburg, Fla., to Atlanta, Ga. The shipment was addressed to "Leggs, Inc.," but was mistakenly delivered to a substation in the suburbs of Atlanta, where "L'Eggs Products, Inc." regularly received deliveries. Employees of the latter company opened each of the packages, finding the individual boxes of film. They examined the boxes, on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents. One employee opened one or two of the boxes, and attempted without success to view portions of the film by holding it up to the light. Shortly thereafter, they called an FBI agent who picked up the packages on October 1, 1975.

> Thereafter, without making any effort to obtain a warrant or to communicate with the consignor or the consignee of the shipment, FBI agents viewed the films with a projector. The record does not indicate exactly when they viewed the films, but at least one of them was not screened until more than two months after the FBI had taken possession of the shipment.

100 S.Ct. at 2398 (footnotes omitted). This Court concluded:

> [W]e are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances.

100 S.Ct. at 2400.

Grassi's conviction was affirmed by the Fifth Circuit five months after that court affirmed Sanders' and Walter's conviction. *Grassi v. United States*, 602 F.2d 1191 (5th Cir. 1980). Grassi's petition for certiorari was therefore filed in this Court many months after that of Sanders and Walter. After this Court decided *Walter* it summarily reversed Grassi's conviction and remanded the case to the Fifth Circuit. This Court's order stated:

> The petition for writ of certiorari [filed by Grassi] is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Walter v. United States* and *Sanders v. United States*, 447 U.S. ____ (1980).

100 S.Ct. at 3041.

On remand, the Fifth Circuit summarily affirmed.[2] It did not consider the substance of this Court's opinion in *Walter*, but instead held that Grassi had waived the search and seizure issue involved in *Walter* by not previously raising that issue in the Fifth Circuit. *United States v. Grassi*, 626 F.2d 444 (5th Cir. 1980).

The Fifth Circuit's waiver determination must be considered in light of the chronology of both Grassi's appeal and Sanders' and Walter's appeal:

1. Grassi, Sanders and Walter all filed common motions to suppress. All the motions raised the issues considered by this Court in *Walter*. The trial court held that all the defendants lacked standing.

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2 The Fifth Circuit affirmed without receiving or requesting any briefs by the parties addressed to the issues raised by this Court on remand. Grassi's petition for rehearing asserted that the Fifth Circuit should not have rendered an opinion without affording the parties an opportunity to be heard. The petition for rehearing was denied.

2. The Fifth Circuit decided *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978) which, like this case, involved Sanders, Walter, TWA and a waylaid shipment of movies. The *Bush* court held that only TWA had standing.

3. Grassi filed his brief in the Fifth Circuit. At the time he filed his brief, the standing issue had already been determined adversely to him in *Bush*. Grassi stated in his brief:

> The issue of whether the Motion to Suppress was properly denied has not been presented because of the recent decision of *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978), which holds that the Appellant [Grassi] has no standing; if, however, this decision is overruled or reconsidered, the Appellant specifically reserves the question of whether he has standing to challenge the search and seizure of the films in the instant case.

United States v. Grassi, 626 F.2d 444, 445 (5th Cir. 1980).[3]

4. The Fifth Circuit effectively overruled *Bush* when it decided Sanders' and Walter's direct appeal.

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3 Grassi's concession in his brief in effect recognized the rule of the Fifth Circuit that any panel of the Court is bound by any result previously reached by another panel. *See, e.g., West v. Brown*, 558 F.2d 757, 759, n.2 (5th Cir. 1977); *McClain v. Seaboard Coastline Railroad Co.*, 490 F.2d 863, 864, n.3 (5th Cir. 1975).

United States v. Sanders, 592 F.2d 788 (5th Cir. 1979). It held that Sanders and Walter, as well as TWA, had standing. This result was mandated by this Court's decision in *Rakas v. Illinois*, 99 S.Ct. 421 (1978). *Rakas* was decided after *Bush*.

5. The Fifth Circuit's decision in *Sanders* gave Grassi standing to challenge the search involved in this case. At the same time, however, it ruled that the very same search which Grassi sought to challenge was valid. It was thus completely fruitless for Grassi to litigate the search issue before the Fifth Circuit, since Grassi's panel would be bound by the Fifth Circuit's *Sanders* decision.

6. Grassi's appeal was decided, and certiorari review was sought in this Court. The government argued to this Court that Grassi's petition for writ of certiorari should be denied because Grassi waived the suppression issue when he failed to argue it fully before the Fifth Circuit. Grassi presented to this Court the facts outlined above in response to the government's waiver argument. This Court refused to deny Grassi's petition as the government requested. Instead, it granted certiorari, reversed the judgment, and remanded the case to the Fifth Circuit for reconsideration in light of *Walter*.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Directly Conflicts With *Walter v. United States*, 100 S.Ct. 2395 (1980). *Walter* Mandates Reversal Of Grassi's Conviction Since It Invalidated The Same Search Involved In This Case.

In *Walter v. United States*, 100 S.Ct. 2395 (1980), this Court considered the fourth amendment claim of Grassi's original codefendants. A majority of this Court held the search invalid. The Court's plurality opinion stated:

> We are . . . persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances.

100 S.Ct. at 2400.

The same conclusion should have been reached with respect to Grassi. Grassi and his original codefendants, Sanders and Walter, all stood in the same posture with respect to the motion to suppress. In *Walter*, this Court determined that "the consignors' legitimate expectation of privacy" had been violated by the government's conduct in this case. 100 S.Ct. at 2402. The trial

court had found as a fact that *all* defendants, Sanders, Walter *and Grassi*, had shipped the material:

> On or about September 25, 1975, someone other than the *moving Defendants, but a person who was acting at their explicit request*, delivered into the possession of the Greyhound Bus Company in St. Petersburg twelve boxes or packages for transportation to and delivery in Atlanta, Georgia.

Transcript of Suppression Hearing, Volume 2 at 101-02.

The Fifth Circuit found that Sanders and Walter "operated" TWA, the corporate front for the pornography operation. *United States v. Sanders*, 592 F.2d at 791. Similarly, the Fifth Circuit found that Grassi "managed" TWA. *United States v. Grassi*, 602 F.2d at 1198. Other evidence showed that Grassi owned TWA's corporate stock. Fifth Circuit Record, Volume IV at 463.

Thus, the fourth amendment claims of Sanders, Walter and Grassi were identical. Those claims were found valid by this Court in *Walter*. They should have been found valid by the Fifth Circuit in this case.

2. The United States Court of Appeals For The Fifth Circuit Violated This Court's Mandate When It Concluded That Grassi Had Waived The Issue Involved In *Walter v. United States*, 100 S.Ct. 2395 (1980).

The fourth amendment issue outlined in argument I, *supra*, was presented to the Fifth Circuit when this Court granted Grassi's original petition for writ of certiorari and remanded to the Fifth Circuit for "further consideration in light of *Walter v. United States*". Grassi then moved for summary reversal in the Fifth Circuit, pointing out to the court that his claim was factually identical to that considered in *Walter*. Rather than considering the fourth amendment issue on the merits, the Fifth Circuit avoided this Court's mandate and concluded that Grassi had "waived" the issue by not arguing it in his initial Fifth Circuit brief, filed more than two years before this Court's opinion in *Walter*.

The Fifth Circuit's "waiver" determination violated this Court's prior mandate. That waiver argument had previously been rejected by this Court. The government had argued in this Court that Grassi's original petition for writ of certiorari should be denied because Grassi waived his suppression issue when he failed to argue it fully before this Court. In response, Grassi presented to this Court the sequence of events outlined in the statement of facts which showed that he never had a legitimate opportunity to assert the fourth amendment issue on appeal:

1. When he filed his initial Fifth Circuit brief, the controlling Fifth Circuit precedent, *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978), held that he did not have standing.

2. That decision was effectively overruled before Grassi's appeal was decided by the Fifth Circuit's opinion in Sanders' and Walter's case. The court held that all had standing, but at the same time held that the search involved in Grassi's case was valid.

3. This Court held the search invalid in *Walter*. By that time, however, Grassi's Fifth Circuit appeal had already been decided.

Faced with this chronology, this Court rejected the government's waiver argument, granted certiorari in Grassi's case, and remanded to the Fifth Circuit for reconsideration in light of *Walter*.

On remand, the Fifth Circuit reevaluated this same chronology,[4] accepted the waiver argument previously advanced by the government and rejected by this Court, held that Grassi had waived the issues involved in *Walter*, and refused to consider the effect of *Walter* on Grassi's case.

Similar facts arose in *In re Nelson*, 445 F.2d 631 (8th Cir. 1971). In *Nelson*, this Court remanded the case for reconsideration in light of the position taken by the Solicitor General as respondent. *Nelson v. United States*,

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4 The government took no position in the Fifth Circuit on remand with respect to the waiver issue.

402 U.S. 1006 (1971). The Eighth Circuit found on remand that the issue raised by this Court's mandate had not been considered by the trial court or on appeal. Rather than finding a waiver, as the Fifth Circuit did here, the Court held that a remand to the trial court was necessary so that the issue could be addressed on the merits. Here too, the issue should have been addressed on the merits. The Fifth Circuit should not have avoided this Court's mandate by finding that the issue contemplated by the mandate was waived.

This Court has plenary power to determine whether its mandate has been scrupulously and fully carried out. *United States v. E. I. Du Pont De Nemours and Co.*, 366 U.S. 316, 325 (1961). The Fifth Circuit evaded this Court's mandate by holding that the issue which this Court ordered it to consider had been waived. Certiorari should be granted to enforce this Court's mandate.

3. The Fifth Circuit's Waiver Determination Conflicts With Decisions Of This Court And Those Of Other Circuits.

The Fifth Circuit held below that Grassi should have argued in his original appeal the fourth amendment issue considered in *Walter* even though the Fifth Circuit had previously held that he had no standing, *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978), and had then determined in the codefendants' case that the search was valid even if the defendants had standing,

United States v. Sanders, 592 F.2d 788 (5th Cir. 1979). Both this Court and other circuits have concluded that a waiver cannot be based on a defendant's failure to make such a fruitless gesture.

In *Grosso v. United States*, 390 U.S. 62 (1968), the defendant asserted a fifth amendment privilege for the first time in this Court. Prior law had rejected such a privilege under the circumstances. The privilege was recognized by this Court in a companion case. This Court concluded that the defendant was entitled to raise the privilege, and that his previous failure to assert it in the face of authority to the contrary was not a waiver.

> Given the decisions of this Court [on the subject] which were on the books at the time of petitioner's trial . . . we are unable to view his failure to present this issue as an effective waiver . . .

390 U.S. at 71. This Court noted that a proper step would be to remand so that the issue could be considered on the merits, the same step taken by this Court when it granted Grassi's first petition and remanded to the Fifth Circuit:

> It might, therefore, be thought that the proper disposition . . . would be to vacate, rather than to reverse, the judgments of conviction, and to return the case to the lower courts for further proceedings consistent with our opinions . . .

390 U.S. at 71. But such a step was unnecessary because reversal was mandated absent a waiver:

> We think, however, that a different course is mandated. . . . Since the record is barren of any evidence on which a finding of waiver . . . might properly be predicated, and since, absent such a waiver, reversal of the conviction would be inevitable in light of [the decision in the companion case], we consider that the entire case should now be finally disposed of at this level.

390 U.S. at 71. The judgment of conviction was reversed.[5]

The same result should have been reached here. "Given the decisions [of the Fifth Circuit] which were

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5 These same waiver principles were applied in *Santos v. United States*, 417 F.2d 340 (7th Cir. 1969, *vacated on other grounds* 397 U.S. 46 (1970). Relying on *Grosso*, the court concluded that the defendant's failure to raise an issue did not constitute a waiver when the issue was fully disposed of by the law in effect at the time of trial and that law was modified only after trial.

> Under the circumstances of the instant case, there is no reason to believe Santos knowingly waived a constitutional right which evolved subsequent to his trial and appeal. Defendants should not be required to anticipate favorable Supreme Court rulings "or compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of . . . [a favorable forthcoming] decision."

417 F.2d at 345, *quoting United States v. Manfredonia*, 391 F.2d 229, 230 (2d Cir. 1968).

on the books at the time of petitioner's [appeal] . . ., [this Court is] unable to view his failure to present this issue as an effective waiver". 390 U.S. at 71. As pointed out in section 1, "absent such a waiver, reversal of the conviction would be inevitable in light of [the decision in *Walter*]". 390 U.S. at 71. This Court should summarily vacate the Fifth Circuit's waiver determination and reverse.

The Fifth Circuit's waiver determination in this case is in direct conflict with numerous other circuit decisions as well. Those cases hold that appellate review of an issue is proper where, as here, the issue is fully raised by codefendants and rejected by the court. In such a circumstance, it would be fruitless for the defendant to reassert the issue. Such fruitless action is not necessary to preserve the issue for appellate review. *United States v. Lefkowitz*, 284 F.2d 310, 313, n.1 (2d Cir. 1960); *United States v. Bagby*, 451 F.2d 920 (9th Cir. 1971); *United States v. Pincione*, 565 F.2d 404 (6th Cir. 1977); *United States v. Love*, 472 F.2d 490 (5th Cir. 1973). In each case, a codefendant asserted the same issue and it was rejected by the court. Each court concluded there was no waiver, since

> [the codefendant] called the matter to the [court's] attention and further exception would have been fruitless.

United States v. Lefkowitz, supra, 284 F.2d at 313, n.1.

In *Love,* the court disposed of an alleged waiver contention which is virtually identical to the alleged waiver here. Defendant Love stated in his appellate brief that he had not filed a motion to suppress in the trial court because he did not think he had standing. The codefendant did file a motion to suppress the same evidence. On appeal, the court found that counsel had not intended to waive any of Love's constitutional rights, but rather was laboring under a mistaken view of standing.

> In any event, we are loath to visit upon Love the good faith but mistaken view of standing of justice. We hold that the failure of Love's counsel to move to suppress the evidence or to object to its introduction should be excused because such a motion or objection would have been a useless formality.

472 F.2d at 496. The court reached the merits of the suppression issue and concluded that the illegally seized evidence should have been suppressed.

These decisions comport with common sense. Waiver rules are designed to ensure that an issue is fully presented and determined by a lower court before it is reviewed by a higher court. When an issue is presented to a lower court by a codefendant and rejected, the policy behind the rule is met. Any additional

requirement placed on the defendant to preserve his right to review constitutes a fruitless technicality without substance.

The Fifth Circuit's waiver determination makes no sense. Certainly, the validity of the search and seizure issue in this case has been fully litigated by Petitioner Grassi and his codefendants. All raised the issue in the trial court. The trial court denied all motions on the same grounds. The codefendants raised the issue in the Fifth Circuit. That court fully explored the issue, held that the defendants had standing, but concluded that the search was valid. This Court granted certiorari, reconsidered the issue, and held the search invalid. Full consideration of the issue by the trial court, the Fifth Circuit and this Court meets the policy behind the waiver rule. There is no waiver.

Simply stated, Grassi's counsel recognized at the time he filed his original Fifth Circuit brief that the search and seizure argument could not be advanced in good faith in light of controlling Fifth Circuit precedent. Grassi now stands to be penalized by that good faith admission, even though this Court subsequently reversed the Fifth Circuit precedent. The Fifth Circuit's determination in this regard should not stand. It compels counsel to advance issues which are completely frivolous and fruitless in light of existing precedent, for fear that a client might waive any rights which could accrue by virtue of a change in that precedent. Such action by counsel, contrary to the code of professional responsibility,[6] should neither be encour-

aged nor compelled, although that is the necessary result of the Fifth Circuit's determination in this case. This Court should reverse Grassi's conviction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment, opinion and order on rehearing of the Fifth Circuit.

Respectfully submitted,

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November 24, 1980

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6 ABA Code Prof. Resp. E.C. 7-4; D.R. 7-102(A)(2), (3). *Cf. United States v. Haymes*, 610 F.2d 309, 311, n.2 (5th Cir. 1980) (court chastized counsel for raising issue previously determined by court adversely to counsel's position).

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

versus

Michael John GRASSI, Jr.,
Defendant-Appellant.

No. 78-5494.

United States Court of Appeals,
Fifth Circuit.

Sept. 19, 1979.

Rehearing and Rehearing En Banc
Denied Oct. 24, 1979.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, CLARK and FAY, Circuit Judges.

CHARLES CLARK, Circuit Judge:

An eleven-count indictment charged Michael John Grassi, Jr., and three other persons with violating various statutes forbidding the interstate transportation of

obscene materials.[1] Grassi was tried separately from his co-defendants and was convicted on all counts. The salient features of the plan to distribute obscene materials and the government's investigation of it are detailed in a prior decision of this court involving the appeals of other participants in the scheme, *United States v. Sanders*, 592 F.2d 788, 790-91 (5th Cir. 1979). In this appeal, Grassi urges that the district court erred in permitting the jury to view the obscene films which were the subject of the indictment and in admitting various other pieces of evidence, that a statement made in the prosecutor's closing argument was an impermissible comment on Grassi's failure to testify, that the evidence was insufficient to convict him, and that the district judge's instructions to the jury were defective. Concluding that no reversible error occurred, we affirm.

The indictment against Grassi was based on the distribution of five obscene films. During the course of Grassi's trial, the government asked the court for permission to show these five films to the jury. Objecting to the admission of the films on grounds that their obscene contents would prejudice the jury against Grassi,

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1 Count one of the indictment charged Grassi with conspiracy to transport obscene materials in interstate commerce in violation of 18 U.S.C. §371. Counts two, four, six, eight, and ten alleged that Grassi had violated 18 U.S.C. §§2 and 1465 by aiding and abetting others to transport obscene materials in interstate commerce. Counts three, five, seven, nine and eleven charged Grassi with aiding and abetting others to use a common carrier engaged in interstate commerce to transport obscene materials in violation of 18 U.S.C. §§2 and 1465.

the defense attorney offered to stipulate that the films were obscene. After the prosecutor had refused to accept the proposed stipulation, the district court partially overruled the defendant's objection and allowed the jury to view three of the films. These films, which require between ten and eleven minutes to show, portray homosexual acts of the most bizarre and repulsive nature. They are also largely repetitious.

Grassi urges that, under Rule 403 of the Federal Rules of Evidence,[2] the films should have been excluded since their probative value, in light of the proffered stipulation, was substantially outweighed by the prejudice arising from them. He argues, in the alternative, that the judge should have permitted the jury to view only a portion of one of the films. The government asserts that it had a right to refuse the stipulation and to show the films since they were necessary to prove the obscenity element of the crime with which Grassi was charged and to show that Grassi was aware of the contents of the films. Asserting that a decision concerning the obscenity of the films could not be made by viewing excerpts from them, the government also contends that the district court did not err in allowing the prosecution to present the three films in their entirety.

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2 Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The process of evaluating the probity and prejudice inherent in a particular piece of evidence can be a complex one calling for a sifting of many disparate factors. Among the central considerations in determining probative value are, first, "how strong a tendency" the proffered evidence has to prove an issue of consequence in the litigation, 22 C. Wright & K. Graham, Federal Practice and Procedure, §5214 at 271 (1978); see *United States v. Beechum*, 582 F.2d 898, 914-915 (5th Cir. 1978) (en banc), and, second, the proponent's need for the evidence, *United States v. Speltzer*, 535 F.2d 950, 956 (5th Cir. 1976); Wright, *supra*, at 268-70. Since the films are admittedly the strongest available proof on the obscenity element of the crime, only the second probity consideration is at issue here.

But for the defendant's offer to stipulate, our task in reviewing the district judge's determination under Rule 403 would be an easy one. The government was required to prove that all the films which were the subject of the indictment were obscene. A work is obscene if "the average person, applying contemporary community standards would find that the work as a whole appeals to the prurient interest," if "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and if "the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). Under the *Miller* standard, a jury is required to view a film in its entirety in order to determine

whether the film is obscene. *United States v. Levine*, 546 F.2d 658, 668 (5th Cir. 1977). Thus, in the absence of the stipulation, the probative value of the films here is as high as it could possibly be; any conclusion that the films were inadmissible because of prejudice would mean that the obscenity element could not be proven and that the defendant could not be tried. Whatever prejudice would arise from admission of the films in this situation could not substantially outweigh the probative value of the films. *See* Wright, *supra*, §5213 at 266.[3]

However, the defendant offered to stipulate that all of the films were obscene. Thus, the central issue in this case is how that offer to stipulate affects the probative value of the films. We examined the effect of an offer to stipulate on the Rule 403 balancing process in *United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir. 1976). At his trial, Spletzer, who was charged with escaping

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3 The government also urges that even if the three films should not have all been admitted on the obscenity issue, they were admissible to show Grassi's knowledge of the obscenity of the films and to show the extent of Grassi's participation in the scheme to distribute them. In order to prove a person has knowingly transported obscene materials, it need not be shown that the defendant was aware that the materials are legally obscene; the knowledge element is satisfied by proof that the defendant knew "of the materials' sexual orientation." *United States v. Thevis*, 490 F.2d 76, 77 (5th Cir. 1974). Here, the government proved that the films were distributed in boxes, the outside covers of which contained a graphic description of the contents of the films, and that Grassi had viewed the boxes. In light of this evidence, the additional probative value, if any, of showing three of the films to prove knowledge and participation was slight.

from a federal prison, offered to admit the fact that at the time of his escape he had been confined in a federal prison pursuant to a judgment of conviction. Despite this tender, the district court permitted the government to introduce a certified copy of Spletzer's prior bank robbery conviction. This court held that the proposed stipulation eliminated the prosecutorial need for the copy of the judgment and that the district court abused its discretion in admitting the copy. The court also noted that the prejudice resulting from the introduction of the prior conviction could have been substantially reduced by deleting the language revealing the nature of the prior offense. *Id.* at 956, n.8.

Although *Speltzer* holds that an offer to stipulate should be among the factors considered in making a decision to admit or exclude the evidence under Rule 403, it does not indicate what result should be reached with regard to the films at issue here. The *Spletzer* court noted that the prosecution could, by introducing the expurgated conviction, still have proven the elements of the crime even if it chose not to accept any part of the defendant's stipulation. Here, the prosecution must show all five films to the jury in order to meet its burden of proof on the obscenity issue. Thus, if the Rule 403 balancing process, taking into account the stipulation, requires the exclusion of any of the five films, then the prosecution must either accept a stipulation regarding the obscenity of the excluded films or face dismissal of that portion of the charges.

In *Parr v. United States*, 255 F.2d 86, 88 *cert. denied*, 358 U.S. 824, 79 S.Ct. 40, 3 L.Ed.2d 64 (1958), we held that, as a general rule, a party may not preclude his adversary's proof by an admission or offer to stipulate. *See United States v. Caldwell*, 117 U.S. App. D.C. 20, 46, 543 F.2d 1333, 1359, n.4 (1974); *United States v. Cockerham*, 155 U.S. App. D.C. 97, 476 F.2d 542 (1973); *United States v. Brickey*, 426 F.2d 680, 686 (8th Cir.), *cert. denied*, 400 U.S. 828, 91 S.Ct. 55, 27 L.Ed.2d 57 (1970); *United States v. Mishkin*, 317 F.2d 634, *cert. denied*, 375 U.S. 827, 84 S.Ct. 71, 11 L.Ed.2d 60 (1973); *Alire v. United States*, 313 F.2d 31, 34-35 (10th Cir. 1962), *cert. denied*, 373 U.S. 943, 83 S.Ct. 1554, 10 L.Ed.2d 699 (1963). At Parr's trial for the distribution of obscene films, some of the films were shown to the jury over Parr's objection and offer to stipulate that the films were obscene. Upon Parr's appeal, this court affirmed on the ground that it was permissible for the government to present proof on the obscenity issue notwithstanding the stipulation since obscenity was an essential element of the crime with which Parr was charged. *Parr, supra*, at 88.

The government contends that *Parr* holds that the probative value of a piece of evidence necessary to prove an element of the crime can never be substantially outweighed by the unfair prejudice arising from it even if the defendant offers to stipulate to the matter. Acceptance of this argument would mean that Rule 403 could never be used to require the government to accept a defendant's stipulation regarding an element of the crime. We decline to adopt this reading of *Parr*.

which was decided before Rule 403 was adopted. The government's contentions are inconsistent with the holding in *Spletzer* that an offer to stipulate should be given weight in the Rule 403 balancing process. In addition, both *Spletzer*, 535 F.2d at 955, and *Parr*, 255 F.2d at 98, recognized that the rule against requiring a party to accept an opponent's stipulation is a general rule and proceeded to examine whether the rule should have been applied in particular fact situations. This implies that the *Parr* rule is not a blanket prohibition against compelling the government to accept a defendant's stipulations. *See United States v. Brinklow*, 560 F.2d 1003, 1006 (10th Cir. 1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 893, 54 L.Ed.2d 798 (1978); Wright, *supra*, §5194 at 198-199.

Moreover, acceptance of the government's arguments could cause ludicrous results in specific cases. In this case, for example, the shipment that was the subject of the indictment contained 871 separate reels of film. *Sanders, supra*, 592 F.2d at 790 n.2. If the government had chosen to indict Grassi on a separate count for each individual film, then the government would have been required to show each of the 871 films at the trial in order to establish their obscenity. Adopting the government's reading of *Parr* would allow the prosecution to exhibit this massive amount of highly inflammatory material even if the defendant offered to stipulate to its obscenity. This result would directly contravene the policies underlying Rule 403. Thus, we

hold that *Parr* does not entirely preclude the requirement that an offer to stipulate must form a part of the Rule 403 weighing of probity and prejudice.[4]

It could also be argued that the offer of a stipulation, as a matter of law, totally eviscerates the probative value of a piece of evidence relevant to the matter stipulated and thus mandates exclusion of that evidence under Rule 403. The effect of adopting this opposite extreme in construing the Rule would be to require a party to accept any stipulation offered by his opponent and thus would allow a party to control the proof presented by his opponent at trial. We also reject this construction of Rule 403. A piece of evidence can have probative value even in the event of an offer to stipulate to the issue on which the evidence is offered. A cold stipulation can deprive a party "of the legitimate moral force of his evidence," 9 Wigmore on Evidence §2591 at 589 (3rd ed. 1940), and can never fully substitute for tangible, physical evidence or the testimony of witnesses. In most cases, a party has the right "to present to the jury a picture of the events relied upon." *Parr, supra,* 255 F.2d at 88.

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4 The Advisory Committee's Notes on the Proposed Federal Rules of Evidence imply that the Rule 403 weighing process can, in some situations, result in requiring a party to accept his opponent's stipulations. The Note concerning Rule 401 states that evidence can be relevant even if offered on undisputed matters, but proceeds to conclude that "*[w]hile situations will arise which call for the exclusion of evidence offered to prove a point conceded by an opponent,* the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403) . . . ." 28 U.S.C.A. Rule 401 at 85 (emphasis added).

Rule 403 also requires a trial court to determine the amount of unfair prejudice resulting from the introduction of a piece of evidence. The phrase "unfair prejudice" does not refer alone to the fact that a particular piece of evidence will have adverse effects on a party's case. Most evidence offered by an opponent should have this effect. *Dollar v. Long Manufacturing, N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977), *cert. denied*, 435 U.S. 996, 98 S.Ct. 1648, 56 L.Ed.2d 85 (1978). Rather," 'unfair prejudice' within this context means an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." Notes of the Advisory Committee on Proposed Federal Rules of Evidence, 28 U.S.C.A. Rule 403 at 102; *see* Wright, *supra* §5215. Thus, it is not enough for a party who asserts that Rule 403 requires an opponent to accept a stipulation merely to show that the evidence that is the subject of the stipulation is detrimental to his case.

In formulating a rule for the application of Rule 403 in instances in which a stipulation is offered, we reject any per se approach. *See* Notes of Advisory Committee on Proposed Federal Rules of Evidence, 28 U.S.C.A. Rule 404 at 109. Rather, as is the case with other applications of Rule 403, determining the weight to be given an offer to stipulate in the balancing process is committed to the sound discretion of the trial court, tempered by the particular facts presented. *See United States v. Jackson*, 576 F.2d 46, 49 (5th Cir. 1978); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1347 (5th Cir. 1978). This

discretion should be exercised to so balance probity against prejudice that the trial is fundamentally fair. In achieving this balance, the court has the power to require the government to accept a tendered stipulation in whole or in part as well as to permit it to reject the offer to stipulate in its entirety.

In this case the district court allowed the prosecution to show three of the films to the jury despite the defendant's offer to stipulate to the obscenity of all of the films. The less prejudicial alternative was to show fewer films and require the stipulation to be accepted as to the rest. However, in the context of this case, we cannot fault the trial judge for not requiring it. With the initial showing, the shock value was largely, if not entirely, spent. The films were repetitious to the point of boredom rather than revulsion. Given the probative value of these films which, even in light of the offer to stipulate, was substantial, we cannot hold that showing three films mandates a finding that the district court abused its discretion in allowing three films to be shown instead of two or one.

Grassi objects to various other evidentiary rulings made by the trial court, including the admission of testimony which referred to the existence of certain sexual paraphernalia in the warehouse where Grassi worked and the failure to exclude testimony which mentioned a local pornography "kingpin" and the hiring of girls to work in a "bath house." Again, the admission or exclusion of such testimony depends upon the result of the Rule 403 balancing process, which calls

for an assessment of the probative value of the testimony in light of all the other evidence adduced at that trial. All of these rulings involve the sort of close calls which district judges must make in the course of trying law suits. Every tender involved matters which were relevant to some essential element of the government's case. None is so plainly wrong as to constitute the unfair prejudice which would make it an abuse of discretion.

Grassi's challenge to the sufficiency of the evidence is meritless. He contends that the proof failed to show he was a knowing participant in the conspiracy charged. However, his role as a "roadman" or manager was well established. It was Grassi who called about this particular shipment when it fell into the wrong hands. The boxes containing each of the subject 871 films display a suggestive photograph and printed summary of the activity involved. In view of the explicit nature of these descriptions, Grassi would have had to be both illiterate and blind not to know he was trafficking in pornography. The repetitious nature of the three films viewed and the packing of all, would enable reasonable jurors to conclude that all five films were in fact obscene. Indeed, defendant continues to insist they were. Although the trial judge should have required the stipulation to be accepted as to the films not shown, the failure to do so in this case affects no substantial right of the defendant and is patently harmless error. Fed.R.Crim.P. 52(a).

Grassi also alleges that the prosecutor's closing argument was improper because the prosecutor said,

> I don't want you to think this is a trial to defeat any person's Fifth Amendment — not Fifth Amendment but any person's First Amendment.

This remark is asserted to constitute a comment on Grassi's failure to testify. Not so. Obviously, it was only a harmless slip-of-the-tongue by the prosecutor, which was immediately corrected and is harmless.

In response to an argument by Grassi's counsel that his pay was low, the prosecutor attempted to assert that Grassi might have another source of income similar to that which the proof showed was made available to another employee by saying that Grassi got "cash money under the table." No proof supported any such payment to Grassi. The argument should not have been made in these terms. The prosecutor also argued Grassi was connected with hiring girls for "bath houses" and massage parlor operations. Grassi said this permitted the inference he had committed other crimes. These comments did find support in the evidence. This type of hard but not foul blow is not error.

Grassi also challenges the district judge's instructions concerning the obscenity element of the crime, contending that the judge erred in failing to exclude children from the community standard portion of the

instruction. We rejected this argument in *Sanders*. 592 F.2d at 795-796.

The conviction of Michael John Grassi, Jr., is

AFFIRMED.

Michael John GRASSI, Jr.,
Petitioner,

versus

UNITED STATES.

No. 79-809.

Facts and opinion, 602 F.2d 1192; 606 F.2d 321.

June 30, 1980. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for a writ of certiorari is granted. Judgment vacated and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Walter v. United States*, 447 U.S. ____, 100 S.Ct. 2395, 64 L.Ed.2d ____ (1980).

UNITED STATES of America,
Plaintiff-Appellee,

versus

Michael John GRASSI, Jr.,
Defendant-Appellant.

No. 78-5494.

United States Court of Appeals,
Fifth Circuit.

Sept. 25, 1980.

Appeal from the United States District Court for the Middle District of Florida

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ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before WISDOM, CHARLES CLARK and FAY, Circuit Judges.

PER CURIAM:

This case is before us on remand from the United States Supreme Court for reconsideration in light of that Court's recent decision in *Walter v. United States*, 447 U.S. ____, 100 S.Ct. 2395, 65 L.Ed.2d ____ (1980). In our prior decision, we affirmed the conviction of

appellant for violating various statutes forbidding interstate shipment of obscene material. *United States v. Grassi*, 602 F.2d 1192 (5th Cir. 1979).

In *Walter*, the Supreme Court reversed a decision of this Court and held that the FBI needed a search warrant to view obscene movie films contained in several packages lawfully in the FBI's possession. Grassi's violations concerned film from these same packages. Our prior opinion did not discuss the validity of the search condemned in *Walter*. Grassi's only reference to that fourth amendment issue in his briefs in this Court was the following cryptic footnote:

> The issue of whether the Motion to Suppress was properly denied has not been presented because of the recent decision of *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978), which holds that Appellant [Grassi] has no standing; if, however, this decision is overruled or reconsidered, the Appellant specifically reserves the question of whether he has standing to challenge the search and seizure of the films in the instant case.

Inasmuch as the standing rules in this circuit have not changed to Grassi's benefit but have, in fact, changed to his detriment,[1] this footnote raises no fourth amendment issue.

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1 *See, e.g., United States v. Salvucci*, ___U.S.___, 100 S.Ct. 2547, 65 L.Ed.2d ___ (1980).

Upon reconsideration as mandated, the conviction of Michael John Grassi, Jr., is again

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5494

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL JOHN GRASSI, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING

OCTOBER 20, 1980

Before WISDOM, CLARK and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge